83-1061

Office-Supreme Court, U.S.
FILED
DEC 27 1983
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

Supreme Court Of The United States

October Term, 1983

CATALYTIC, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 136,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

EDWARD S. ALLEN
(Counsel of Record)
JOHN RICHARD CARRIGAN
JOHN J. COLEMAN, III
P.O. Box 306
Birmingham, Alabama 35201
(205) 251-8100
Counsel for Petitioner

Of Counsel:
BALCH BINGHAM BAKER WARD SMITH
BOWMAN & THAGARD
Post Office Box 306
Birmingham, Alabama 35203
(205) 251-8100

QUESTIONS PRESENTED

1. Whether Section 7 of the National Labor Relations Act protects an economic striker from discharge by an employer acting in good faith without unlawful animus, when the striker admitted making an unlawful animus, ing telephone call to the wife of the non-striking employee, and when such call was not made from the picket line, not as part of any concerted activity, and not in the course of any effort to persuade a non-striking employee to join the strike.

2. Whether Section 10 (c) of the National Labor Relations Act precludes the National Labor Relations Board from ordering the reinstatement of an economic striker who was discharged without unlawful animus for an admitted unlawful act directed at the home of a non-striking fellow employee.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Record Citation	iv
Citation to Opinions Below	1
Jurisdiction	2
Applicable Statutory Provisions	2
Statement of the Case	3
Reasons for Granting the Writ of Certiorari –	
I. The Eleventh Circuit's Adoption Of The NLRB Standard That Verbal Threats, Short Of A Direct Threat Of Immediate Physical Harm, Lose The Protection Of The Act Only When Accompanied By Physical Acts Or Gestures Presents A Conflict Among The Circuit Courts Of Appeals; Departs From The Accepted Course Of Judicial Proceedings By Failing To Follow Controlling Precedent; And Raises A Significant Issue Concerning The Rights Of Non-Striking Employees To Be Free From Fear And Intimidation.	6
II. The "Protective Mantle" Placed By The NLRB And The Eleventh Circuit Over Unlawful Misconduct Directed At Non-Strikers Is Fundamentally Inconsistent With Section 7 Of The Act.	12

TABLE OF AUTHORITIES

Cases: *Page*

Associated Grocers of New England v. NLRB, 562 F.2d 1333 (1st Cir. 1977) 7

Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) 8

Firestone Tire & Rubber Co. v. NLRB, 449 F.2d 511 (5th Cir. 1971) 7, 8

NLRB v. Burnup & Sims, 379 U.S. 21 (1964) 9

NLRB v. First National Maintenance Corporation, 452 U.S. 666 (1981) .....

NLRB v. Moore Business Forms, 574 F.2d 835 (5th Cir. 1978) 8

NLRB v. McQuaide, Inc., 552 F.2d 519 (3rd Cir. 1977) 7

NLRB v. Transportation Management Corp., ____ U.S. 113 LRRM 2857 (June 15, 1983 11

NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962) 9

Southern Steamship Company v. NLRB, 316 U.S. 31 (1942) 8

Woodcraft Division/Georgia Kraft Company v. National Labor Relations Board and Laborers' International Union of North America, AFL-CIO, Local 246, 696 F.2d 931 (11th Cir. 1983), cert. granted ____ U.S. ____ (1983) 6

Statutes:

28 U.S.C. § 2101 (c) 2

28 U.S.C. § 1254 (1) 2

29 U.S.C. § 157 2

29 U.S.C. § 158 (a) (1) 2

29 U.S.C. § 158 (a) (3) 2

29 U.S.C. § 160 (c) 2

29 U.S.C. § 160 (e) 2

29 U.S.C. § 160 (f) 2

RECORD CITATION

This petition involves issues arising out of the Eleventh Circuit Court of Appeals' enforcement of an order of the National Labor Relations Board. The transcript and exhibits of the initial administrative hearing were certified to the Eleventh Circuit Court of Appeals as Volumes I and II of the Offical Record, and are cited in this petition as follows:

"T" refers to the Official Hearings Transcript (Vol. 1 of the Record on Appeal, No. 82-7357).

"GC" refers to the General Counsel's Exhibits received in evidence at the hearing (Vol. II of the Record on Appeal, No. 82-7357).

"RX" refers to the Company's exhibits received in evidence at the hearing (Vol. II of the Record on Appeal, No. 82-7357).

No.

IN THE

Supreme Court Of The United States

October Term, 1983

CATALYTIC, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 136,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner, Catalytic, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is an unpublished opinion and is reprinted in the Appendix at page A6.[1] The Decision and Order of the National Labor Relations Board

[1]References to the opinions below are designated by "A", followed by the appropriate Appendix page number.

("NLRB") and the decision of the Administrative Law Judge ("ALJ") are reported at 264 NLRB No. 154. The NLRB's decision is reprinted in the Appendix at pages A-7 through A-9, and the Decision and Supplemental Decision of the ALJ are reprinted in the Appendix at pages A-10 through A-24 respectively.

JURISDICTION

The Court of Appeals ordered enforcement of the NLRB Order on August 19, 1983. The petitioner's petition for rehearing and suggestion for rehearing en banc was denied on September 28, 1983. This Petition for Writ of Certiorari was filed within ninety (90) days of that date, in accordance with 28 U.S.C. § 2101 (c) and Rules 20.2 and 20.4 of the Rules of the Supreme Court of the United States. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

APPLICABLE STATUTORY PROVISIONS

As provided by Supreme Court Rule 21.1 (f), the verbatim quotation of the following provisions of the National Labor Relations Act ("Act") (29 U.S.C. § 151 *et seq.*) are set forth in the separately bound Appendix hereto.

1. Section 7 of the Act (29 U.S.C. § 157);
2. Section 8 (a) (1) of the Act (29 U.S.C. § 158 (a) (1));
3. Section 8 (a) (3) of the Act (29 U.S.C. § 158 (a) (3));
4. Section 10 (c) of the Act (29 U.S.C. § 160 (c));
5. Section 10 (e) of the Act (29 U.S.C. § 160 (e)); and
6. Section 10 (f) of the Act (29 U.S.C. § 160 (f)).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

The issues involved in this Petition arise from an economic strike against Catalytic, Inc. by Local 136 of the International Brotherhood of Electrical Workers in the fall of 1980. At the conclusion of the strike, a contract was executed and all strikers with the exception of Philip Lang and Samuel Thrash were reinstated. These two strikers were suspended, and later terminated, based on Catalytic's belief that such strikers had engaged in misconduct. The Union filed charges against Catalytic alleging that Catalytic had violated §§ 8(a) (1) and 8(a) (3) of the Act by discharging Strikers Lang and Thrash for misconduct during the strike.

After a one-day hearing, the Administrative Law Judge held that Striker Lang had in fact not committed misconduct of which he had been accused, and that Striker Thrash (notwithstanding his guilty plea in state criminal proceedings), had not engaged in misconduct so serious as to warrant denying him the protection of the Act. [A-14—A-24]. Catalytic took exceptions to the decision of the ALJ, on several grounds including the ALJ's acknowledged failure to consider the brief filed by Catalytic. The NLRB issued an Order Remanding Proceeding To Administrative Law Judge, dated February 11, 1982 [A-12], directing the ALJ to consider Catalytic's brief [A-12—A-13], and the ALJ then issued his Supplemental Decision stating, inter alia, that he had considered Catalytic's brief but reaffirmed each of his prior findings and conclusions [A-10—A-11].

Catalytic again took exceptions to the NLRB, and the NLRB on Catalytic's second exceptions issued a Decision and Order finding the same violations as the ALJ [A-7—A-9]. Apanel of the Eleventh Circuit enforced the NLRB's

order and denied Catalytic's petition for review in a *per curiam* opinion dated August 19, 1983 [A-6]. The Eleventh Circuit subsequently denied Catalytic's request for rehearing and suggetion for rehearing en banc on September 28, 1983 [A-5].

B. Background of Company and Union

Catalytic's Wilsonville, Alabama facility is a pilot plant for solvent-refined coal, a fuel intended to avoid certain environmental problems encountered with the use of coal. The economic strike in August, 1980, was Catalytic's first strike, and involved a unit of approximately 75 employees. IBEW Local 136 was the only union representing employees at Catalytic's Wilsonville facility. Catalytic conducted a three shift operation and continued such operation until the economic strike ended on September 17, 1980.

C. The Striker Misconduct Issue

Catalytic discharged Striker Thrash on September 11, 1980, as a result of Thrash's identification as a party responsible for a harassing telephone call made to the home of non-striking employee Sanford Simon. On an afternoon when non-striking employee was working at the Catalytic plant, Striker Thrash placed a call from his home to the home of non-striking employee Sanford Simon. When Diane Simon (wife of the non-striking employee) answered the telephone, striker Thrash did not identify himself, but said "you God damned bitch" and hung up the phone.[2] Because the Simon home had received precious anonlmous threatening telephone calls, Sanford Simon had arranged

[2]Striker Thrash admitted the telephone call, but said he merely said "bitch" without adding the profane expletive; the ALJ credited Diane Simon's version of the conversation [A-16 n. 2].

to have such calls traced. This call was traced to Thrash's home, some two blocks away.

Sanford Simon contacted the local police, and swore out a complaint against Thrash, who was arrested on September 9, 1980. Catalytic Plant Manager Harry Lewis discharged Thrash solely for the unlawful harassing telephone call [A-20].

Striker Thrash later pled guilty to the charge against him. The ALJ found, as Thrash admitted, that Thrash had made the telephone call, and credited Diane Simon's version of the call [A-16 n.2,]. The ALJ found that Catalytic discharged Thrash on account of that unlawful call, and the ALJ did not find any unlawful animus or other unlawful motive for Thrash's discharge [A-20]. In fact, the ALJ noted the absence of any unfair labor practice on Catalytic's part [A-20]. The TLJ did find, however, that Thrash's unlawful act was not sufficiently serious to deprive Thrash of the "protective mantle" of the Act [A-21].[3]

The NLRB, after requiring the ALJ to consider Catalytic's brief (as a result of Catalytic's first exceptions) later upheld the ALJ's Supplemental Decision that Catalytic violated §§ 8(a) (1) and 8(a) (3) by discharging and declining to reinstate Thrash for his admitted unlawful act. Neither the ALJ nor the NLRB at any time held that Catalytic had an unlawful motive, or that Thrash's discharge resulted from anything other than Catalytic's good faith belief that striker Thrash had in fact engaged in such misconduct.

---

[3]The other striker denied reinstatement, Philip Lang, was credited by the ALJ in his denial that he had engaged in the misconduct for which he had been terminated [A-21]. This Petition does not address Lang's discharge or the subsequent order of reinstatement.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's Adoption Of The NLRB Standard That Verbal Threats, Short Of A Direct Threat Of Immediate Physical Harm, Lose The Protection Of The Act Only When Accompanied By Physical Acts Or Gestures Presents A Conflict Among The Circuit Courts Of Appeals; Departs From The Accepted Course Of Judicial Proceedings By Failing To Follow Controlling Precedent; And Raises A Significant Issue Concerning The Rights Of Non-Striking Employees To Be Free From Fear And Intimidation.

A. The Eleventh Circuit Here, As In *Georgia Kraft*, Accepted The NLRB Standard That A Striker's Verbal Misconduct Is Protected, In Conflict With Other Courts Of Appeals.

As in *Woodkraft Division/Georgia Kraft Company v. National Labor Relations Board and Laborers' International Union of North America, AFL-CIO, Local 246*, 696 F.2d 931 (11th Cir. 1983) cert. granted ..... U.S. ..... (1983), (hereafter "Georgia Kraft") this case presents the significant problem of protection of non-strikers' rights when the NLRB presumes that the "protective mantle of the Act" extends to verbal misconduct unless, in the opinion of the NLRB, such misconduct is accompanied by acts or gestures so serious as to deprive the employee of the protection of the Act.

The Eleventh Circuit accepted the NLRB presumption that all activity by an economic striker is protected, whether or not it is concerted, and whether or not it is specifically protected by § 7, unless the NLRB considered the activity to be serious misconduct. The NLRB has in fact drawn a distinction between verbal misconduct and other forms of misconduct, and has treated verbal misconduct as non-serious and, therefore, as protected by the Act, unless verbal misconduct is accompanied by acts or gestures.

The Eleventh Circuit's acceptance of the NLRB holding that Thrash was entitled to reinstatement because his misconduct was not sufficiently serious conflicts with the decisions of those other Courts of Appeals that strikers could be discharged for threatening verbal misconduct unaccompanied by acts or gestures The First Circuit in *Associated Grocers of New England v. NLRB*, 562 F.2d 1333 (1st Cir. 1977) and the Third Circuit in *NLRB v. McQuaide, Inc.*, 552 F.2d 519 (3rd Cir. 1977) adopted an objective standard that threats which reasonably instill fear of bodily harm or reasonably intimidate are not protected by § 7.

The Eleventh Circuit's predecessor Fifth Circuit, in *Firestone Tire & Rubber Co. v. NLRB*, 449 F.2d 511 (5th Cir. 1971) denied enforcement to *Firestone Tire & Rubber Company*, 187 NLRB 54 (1970), (a decision on which the ALJ relied) while explicitly rejecting the NLRB characterization of specific conduct as non-threatening and not sufficiently serious to warrant discharge of a striker.

Striker Thrash's unlawful harassing telephone call reasonably intimidated the Simons because of the context in which it was received. Such an anonymous expression of anger carried an unequivocal message to the wife of a non-striker that someone who bore her ill-will because her husband was working during the strike knew where she lived, and knew when she was home alone. The Simons considered the call serious enough to warrant the filing of a complaint with the police.

As in *Georgia Kraft*, the critical issue underlying the Eleventh Circuit decision is that the NLRB may extend the "protection" of the Act to verbal misconduct because the NLRB considers such verbal misconduct not to be threatening.

B. The Eleventh Circuit Failed To Follow Controlling Precedent.

1. The Eleventh Circuit disregarded binding Fifth Circuit precedent, apparently in favor of its own recent *Georgia Kraft* decision, as to which certiorari has been granted.

The Fifth Circuit had not accepted the NLRB presumption that verbal misconduct unaccompanied by acts or gestures is non-serious. See *Firestone Tire & Rubber Co. v. NLRB*, 449 F.2d 511 (5th Cir. 1971). Although the Eleventh Circuit was bound by *Firestone*, *see Bonner v. City of prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981), the *Georgia Kraft* decision did accept that principle and apparently was the basis for the *per curiam* enforcement in this case.

2. The Eleventh Circuit failed to consider precedent of this Court that unlawful activity is unprotected.

The Eleventh Circuit's decision conflicts with a significant precedent because it permits the NLRB to treat unlawful conduct as protected conduct despite this Court's decision to the contrary. Striker Thrash's call was a crime. This Court has previously held in *Southern Steamship Company v. NLRB*, 316 U.S. 31 (1942) that the NLRB is not authorized to declare unlawful acts to be "protected activity." In *Southern Steamship*, the NLRB held that acts of mutiny, crimes under 18 U.S.C. §§ 292 and 293, were "protected activity". See 316 U.S. at 36. Not surprisingly, this Court reversed:

> [T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently, the entire scope of Congressional purpose calls for careful

> accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

316 U.S. at 47.

This Court reiterated that unlawful activity is unprotected activity in *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962).

It was not striker Thrash's participation in the strike that caused his discharge; it was an independent unlawful act away from the picket line, not in concert with anyone, and without any protected purpose. An act in those circumstances simply should not be presumed to be protected, and the decision of the Eleventh Circuit that the NLRB was supported by sufficient evidence that Tharsh's misconduct was not "sufficiently serious" to deny him protection of the Act conflicts with controlling precedent because it fails to consider that the NLRB may not determine unlawful activity in these circumstances to be "protected" by the Act.

3. The Eleventh Circuit endorsed the NLRB's misapplication of *NLRB v. Burnup & Sims.*

The Eleventh Circuit accepted without discussion the NLRB's misapplication of the decision of this Court in *NLRB v. Burnup & Sims,* 379 U.S. 21 (1964). The ALJ announced during the hearing that the appropriate legal standard was that enunciated in *Burnup & Sims,* and the case was tried on that theory. *Burnup & Sims* held that an employer could be held responsible for a violation of the Act for discharging an employee in the good faith but mistaken belief that the employee had engaged in misconduct. The order of proof established by *Burnup & Sims* as follows:

> . . . In sum, § 8 (a) (1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that *the employee was not, in fact, guilty of that misconduct.* (Italics supplied).

379 U.S. at 23.

There was no evidence that Catalytic acted in bad faith or for any proscribed motive. The only evidence of Catalytic's motive, was that it had a single, lawful motive, in discharging Thrash because of his conduct of which it believed him to be guilty. In a *Burnup & Sims* situation (*i.e.*, where the employer acts in a good faith belief that an employee engaged in misconduct) it is the responsibility of the General Counsel to demonstrate not merely that the employee was engaged in protected activity and the employer should have known of it, but also that the employee was not in fact guilty of such misconduct. (See the ALJ's decision at A-20). Such a burden of proof is fundamental where there is no evidence of an unlawful motive.

Striker Thrash's discharge must be distinguished from cases in which an unlawful motive can be proven, and from cases in which disproportionate punishment gives rise to an inference that the stated reason for discipline is a pretext for unlawful discrimination. There was no evidence that Catalytic acted for an unlawful motive, or that Catalytic's motive was anything other than what was stated.

In the absence of an unlawful or mixed motive, the proper inquiry is whether the employee was in fact innocent. If an employee is found to be innocent, a *Burnup & Sims* violation is established; but if the employee is not innocent, there is no basis to extend the "protective mantle" of the Act to preclude good faith discipline.

This Court's decision in *NLRB v. Transportation Management Corp.*, ... U.S. ....., 113 LLRM 2857 (June 15, 1983) upheld the Board's *Wright Line* test[4] that an employer could rebut the General Counsel's showing of anti-union animus contributing to a discharge, if the employer proved in a "mixed motive" or "dual motive" situation. If the employer demonstrated by a preponderance of the evidence that the worker would have been fired even if he had not been involved with the Union. This creates a substantial anomaly, because there is no dispute that Thrash would have been discharged for that act, whether or not a strike was present, and since the General Counsel made no showing that any unlawful motive contributed to the discharge.

The decision of the Eleventh Circuit to ignore the question of employer motive entirely, was inconsistent both with proper application of *Burnup & Sims*, as well as the *Wright Line* test approved in *NLRB v. Transportation Management Corporation*.

The function of review exercised by the Eleventh Circuit on the NLRB's petition for enforcement under § 10 (e) of the Act, and under § 10 (f) of the Act as to Catalytic's petition for review was to apply the law, and not simply to defer questions of the law to the NLRB as it would defer questions of fact. The decision of the Eleventh Circuit enforcing based on "substantial evidence" simply ignores the necessary review of the legal standard applicable to Thrash's discharge.

---

[4]*Wright Line*, 251 NLRB 1083 (1980), enforced 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

II. The "Protective Mantle" Placed By The NLRB And The Eleventh Circuit Over Misconduct Directed At Non-Strikers Is Fundamentally Inconsistent With Section 7 Of The Act.

Thrash's misconduct which is at the heart of this case was clearly directed at infringing upon rights guaranteed a non-striker by Section 7 of the Act. Section 7, by its plain terms, affords the same protection to the right not to strike as it does to the right to strike. The NLRB, and the Eleventh Circuit, gave no consideration to the fact that Thrash's unlawful act was directed at the home of a non-striker precisely because the non-striker exercised his Section 7 right not to strike.

The concept that striker misconduct directed at non-striking employees should be tolerated unless "serious" necessarily implies that the Eleventh Circuit and the NLRB have established protection under the Act for non-serious misconduct directed at non-strikers. The Act neither explicitly, nor by necessary implication, subjects non-strikers to misconduct at the hands of strikers, simply to protect the right to strike. The failure of the Eleventh Circuit and the NLRB to reconcile the rights of strikers to strike with that of non-strikers to be free from any mis- not to strike is a grave misinterpretation of Section 7. This Court should not permit it to continue.

In Thrash's case, based on his own admission, he committed an unlawful act because Sanford Simon was working while Thrash was not. Thrash's act was not provoked either by Catalytic or by Simon; it was not part of an altercation at the picket line; and Thrash offered no justification whatsoever.

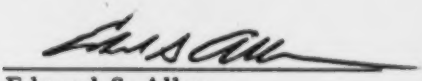
In these circumstances, to enforce the NLRB's order compelling Thrash's reinstatement with back pay is to con-

done a violation of Sanford Simon's Section 7 rights, and this Court should not permit it.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the opinion of the Eleventh Circuit Court of Appeals.

Respectfully submitted,



Edward S. Allen

Counsel for Petitioner

Of Counsel:

BALCH BINGHAM BAKER WARD SMITH
BOWMAN & THAGARD
Post Office Box 306
Birmingham, Alabama 35201
(205) 251-8100